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REPLY APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 03-3703

ILLINOIS MUNICIPAL RETIREMENT FUND,
Plaintiff-Appellee,

v.

CITIGROUP, INC., J.P. MORGAN SECURITIES, INC.,
BANC OF AMERICA SECURITIES, LLC, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 03 C 465—G. Patrick Murphy, *Chief Judge*.

Argued November 9, 2004—Decided December 2, 2004

Before FLAUM, *Chief Judge*, and CUDAHY and POSNER, *Circuit Judges*.

FLAUM, *Chief Judge*. Plaintiff-appellee filed suit in Illinois state court. Following removal by defendants-appellants, the district court remanded the action to state court. Defendants-appellants appeal, arguing that the district court exceeded its authority, and seeking vacatur of the remand order. For the reasons stated herein, we affirm.

I. Background[1]

Between 1998 and 2001, WorldCom, once the second largest telecommunications company in the world, issued debt securities worth billions of dollars in connection with which defendants-appellants served as underwriters. WorldCom agreed to indemnify appellants for liability arising out of untrue statements or omissions in prospectuses issued in connection with the offerings.

On June 25, 2002, WorldCom announced that it had improperly treated $3.8 billion in ordinary costs as capital expenditures and that it would have to restate its financial statements. This led to the filing of numerous individual and class actions in state and federal courts across the country. On October 8, 2002, the Judicial Panel on Multidistrict Litigation ("JPML") ordered that actions pending in federal courts be centralized in the Southern District of New York before Judge Cote, pursuant to 28 U.S.C. § 1407, the multidistrict litigation statute.

Many of the individual actions brought in state courts following WorldCom's announcement were filed by state and private pension funds that had purchased WorldCom bonds ("bondholders"). Rather than joining a class action against WorldCom and the other defendants, the bondholders, represented by Milberg Weiss Bershad Hynes & Lerach, brought individual actions in state courts across the country. Between July 5, 2002 and October 3, 2003, Milberg Weiss filed at least 47 of these individual actions on behalf of over 120 plaintiffs.

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[1] The facts in this section are taken principally from the Second Circuit's recent decisions in the WorldCom multidistrict litigation. *See Ret. Sys. of Ala. v. J.P. Morgan Chase & Co.*, 386 F.3d 419 (2d Cir. 2004); *Cal. Pub. Employees' Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86 (2d Cir. 2004).

The bondholders' actions filed in state courts, unlike the class actions filed in federal courts, do not assert claims under the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. § 78a, *et seq.*; instead, they allege claims only under the Securities Act of 1933 ("1933 Act"), 15 U.S.C. § 77a, *et seq.* Unlike the 1934 Act which provides for exclusive federal jurisdiction, *see* 15 U.S.C. § 78aa, the 1933 Act allows for concurrent federal and state jurisdiction and has an anti-removal provision. *See* 15 U.S.C. § 77v(a) ("[N]o case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."). Drafting the complaints in this way would seem to ensure a state forum and prevent removal. If this was the bondholders' intention, however, their efforts have been frustrated by WorldCom's July 2002 bankruptcy filing. After that date, state-court defendants began removing the actions to federal court on the ground that they are related to WorldCom's bankruptcy. *See* 28 U.S.C. §§ 1334(b), 1452(a).[2] Many of these removed bondholder actions have been identified as "tag-along actions"[3] and transferred to Judge Cote.

On March 3, 2003, Judge Cote denied a motion to remand filed by the New York City Employees' Retirement System ("NYCERS"), holding that subject matter and removal jurisdiction were proper and that abstention was not appropriate.

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[2] Section 1334(b) provides, in relevant part: "[T]he district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." Section 1452(a), titled "Removal of Claims Related to Bankruptcy Cases," provides, in relevant part: "A party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title."

[3] JPML Rule 1.1 defines a "tag-along action" as "a civil action pending in a district court and involving common questions of fact with actions previously transferred under Section 1407."

See In re WorldCom, Inc. Sec. Litig., 293 B.R. 308 (S.D.N.Y. 2003).[4] This ruling applied to the actions transferred to Judge Cote pursuant to the JPML's October 8, 2002 order, as well as to the tag-along actions. On May 11, 2004, the Second Circuit affirmed Judge Cote's denial of the motion to remand, holding that the 1933 Act's anti-removal provision does not bar removal of actions under § 1452(a). *See Cal. Pub. Employees' Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86 (2d Cir. 2004).

On June 18, 2003, plaintiff-appellee Illinois Municipal Retirement Fund ("IMRF") filed suit in Illinois state court, alleging claims arising out of IMRF's purchase of WorldCom debt securities and alleging false and misleading statements in registration statements and prospectuses issued in connection with the bond offerings, of which the underwriter appellants allegedly were aware or should have been aware. Consistent with the litigation strategy of other individual pension funds, and represented by the same attorneys,[5] IMRF alleged claims only under the 1933 Act. On July 16, 2003, appellants removed the case to the United States District Court for the Southern District of Illinois, premising removal on § 1452(a). On the same day, appellants filed a notice with the clerk of the JPML, requesting that the action be transferred as a tag-along action to Judge Cote. On July 25, 2003, appellants filed a motion to stay the action pending a determination by the

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[4] Plaintiffs in numerous individual bondholder actions, represented by Milberg Weiss, were permitted to intervene in NYCERS's motion so that their arguments concerning removal could be heard on an expedited basis. *Id.* at 315.

[5] On May 1, 2004, the west coast partners of Milberg Weiss Bershad Hynes & Lerach LLP formed a new law partnership, Lerach Coughlin Stoia Geller Rudman & Robbins LLP. Plaintiff-appellee is represented by the new partnership.

JPML on the issue of transfer. The JPML issued a conditional transfer order on September 3, 2003, notice of which appellants filed with the district court on September 5, 2003.

On the same day that appellants filed their motion to stay, June 25, 2003, IMRF filed a motion to remand or abstain, raising three arguments: (1) the 1933 Act absolutely prohibits removal, even by way of § 1452(a), (2) IMRF's action does not fall within federal bankruptcy jurisdiction; and (3) even if there is subject matter and removal jurisdiction, the district court should abstain from exercising jurisdiction and should remand pursuant to § 1334(c)(1), which permits abstention in cases related to a bankruptcy case "in the interest of justice, or in the interest of comity with State courts or respect for State law," or § 1452(b), which permits remand of claims related to a bankruptcy case "on any equitable ground." These were the same arguments IMRF's attorneys already had made to Judge Cote without success, and would later make to the Second Circuit with the same result.

On September 9, 2003, although acknowledging Judge Cote's contrary decision and the JPML's conditional transfer order, the district court remanded this action to Illinois state court. (Sept. 9, 2003 Order at 3.) The court found that the 1933 Act bars removal but that its language conflicts with § 1452(a). (*Id.*) It resolved this conflict by concluding that "the rules of statutory construction require [the 1933 Act] to control over the more general provisions of 28 U.S.C. §§ 1334(b) and 1452" and that "the only way to give effect to the legislative intent behind its enactment is to construe it as a bar to removal even under these circumstances." (*Id.* at 3-4.) The district court further held that even if the 1933 Act did not bar removal, the claims were "not related to" the WorldCom bankruptcy and cannot be removed under Section 1452," and also that "remand is appropriate pursuant to the doctrines of permissive abstention and equitable remand" under §§ 1334(c)(1) and 1452(b). (*Id.* at 4.) The court denied

appellants' motion to stay proceedings pending the final transfer decision of the JPML and granted the IMRF's motion to remand or abstain. (*Id.* at 5.) On October 9, 2003, appellants filed a notice of appeal.

II. Discussion

A. Appellate Jurisdiction

We first must determine whether we have jurisdiction to hear this appeal. The general grant of our appellate jurisdiction is found in 28 U.S.C. § 1291, which provides that courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States." The breadth of our jurisdiction, however, is limited by several statutes which specifically bar appellate review of certain types of "final decisions." Each of the following statutes limit our jurisdiction in this case, given the district court's alternative grounds for remand: 28 U.S.C. § 1447(d) provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise"; § 1334(d) bars appellate review of "[a]ny decision to abstain" made in a bankruptcy case or proceeding; and § 1452(b) bars review of equitable remands of claims related to a bankruptcy case.

The parties agree that these three statutes bar appellate review of the district court's *reasons* for remand in this case.[6] Appellants argue, however, that "antecedent questions of power are properly presented to courts of appeals." In other words, appellants contend that the district court lacked

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[6] In unpublished opinions, the Sixth and Eleventh Circuits dismissed similar appeals on this ground. *See Tenn. Consol. Ret. Sys. v. Citigroup, Nos.* 03-5785, 03-5786 (6th Cir. Nov. 4, 2003) (unpublished); *Ret. Sys. of Ala. v. J.P. Morgan Chase & Co.*, No. 02-15385 (11th Cir. June 18, 2003) (unpublished).

statutory authority to issue the remand order and that we may vacate the order even though we may not review its reasoning.

In *Thermtron Products, Inc. v. Hermansdorfer*, where the Supreme Court first decided that § 1447(d) is not a complete bar to appellate review of remand orders, the Court held that it had appellate jurisdiction to review a remand order premised on the district court's overcrowded docket. 423 U.S. 336 (1976), *abrogated on different grounds by Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996). "Because the District Judge remanded a properly removed case on grounds that he had no authority to consider, he exceeded his statutorily defined power." *Id.* at 351. We have explained that "*Thermtron* permits us to decide whether a district court has the power to do what it did, although we cannot examine whether a particular exercise of power was proper." *In re Cont'l Cas. Co.*, 29 F.3d 292, 294 (7th Cir. 1994).

In *Continental Casualty*, we issued a writ of mandamus ordering a district court to "recall its remand and reinstate the case on its docket" because it had remanded sua sponte for a procedural removal defect. *Id.* at 295. We held that the district court lacked statutory authority to remand a case based on a procedural defect in removal absent a motion by a party. *Id.* at 294-95. In so holding, we did not consider the substance of the district court's order, but merely explained that the "lack of a motion deprives a district court of *power* to return a case to state court." *Id.* at 294 (emphasis in original).

In *Thermtron*, the Supreme Court permitted appellate review of a statutorily invalid reason for remand. In *Continental Casualty*, we recognized that appellate review also may be had where a district court has articulated statutorily valid reasons for remand yet has exceeded its authority in some other way. This principle has been applied in various contexts. For example, in *Tramonte v. Chrysler Corp.*, 136 F.3d 1025 (5th Cir. 1998), the defendant asked the judge to

recuse herself because a member of the judge's family was a potential class member. The judge denied the recusal motion and remanded the case for lack of subject matter jurisdiction. The defendant appealed, arguing that the judge lacked authority to enter the remand order because she was disqualified from handling the case under the federal recusal statute.[7] The Fifth Circuit agreed, explaining that, if the judge should have recused herself, any subsequent order must be vacated:

> Our vacatur of the remand order would therefore not constitute a review of the merits of that order, prohibited by 28 U.S.C. § 1447(d). Rather, we would be performing an essentially ministerial task of vacating an order that the district court had no authority to enter for reasons unrelated to the order of remand itself.

Tramonte, 136 F.3d at 1028. Similar reasoning has been relied upon in vacating remand orders entered by magistrate judges acting without the parties' consent. *See, e.g., Vogel v. U.S. Office Prods. Co.*, 258 F.3d 509, 517-19 (6th Cir. 2001) (holding that a remand order entered by a magistrate judge was beyond his statutory authority and concluding that review was proper because the court of appeals was not reviewing the merits of the remand order itself); *In re U.S. Healthcare*, 159 F.3d 142, 146-47 (3d Cir. 1998) (same). Thus, although §§ 1447(d), 1334(d), and 1452(b) preclude appellate review of the reasoning contained in many remand orders, they do not deprive appellate courts of jurisdiction to vacate a remand order issued in excess of a district court's statutory authority.

In an earlier case we suggested that it would be within our appellate jurisdiction to vacate a remand order issued by a

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[7] *See* 28 U.S.C. § 455(b)(5) (Any judge of the United States shall disqualify himself where "[h]e" or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person . . . [i]s a party to the proceeding.").

transferor court after the case has been transferred by the JPML. *See Gen. Elec. Co. v. Byrne*, 611 F.2d 670, 673 (7th Cir. 1979) ("[T]he entry of the transfer order deprives the transferor court of jurisdiction until the case is returned to it, so that any action taken by the transferor court after transfer would be ineffective."). Today we make the principle underlying this observation explicit: When a district court exceeds its statutory authority by the very issuance of a remand order—as opposed to merely issuing a flawed remand order—it is within our appellate jurisdiction to review that court's exercise of authority and vacate the ineffective order, provided we can do so without reference to the contents of the remand order. In this case, we can review the contested exercise of authority without considering the reasoning in the district court's remand order. Accordingly, we do so here.

B. Authority to Remand

We review de novo whether 28 U.S.C. § 1407, the multidistrict litigation statute, prohibits a district court from issuing a remand order in contravention of a potential transferee court's earlier jurisdictional ruling. *See Resolution Trust Corp. v. Gallagher*, 10 F.3d 416, 418 (7th Cir. 1993) (questions of statutory construction are subject to de novo review).

Section 1407 provides, in part:

> (a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. . . .
>
> (b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom

> such actions are assigned by the judicial panel on multi-district litigation. . . .

28 U.S.C. § 1407. Under the rules of procedure adopted by the JPML, *see* 199 F.R.D. 425 (2001), upon learning of a potential tag-along action, an order "may be entered by the Clerk of the [JPML] transferring the action to the previously designated transferee district court." JPML Rule 7.4(a). "The Clerk of the [JPML] shall serve this order on each party to the litigation but, in order to afford all parties the opportunity to oppose transfer, shall not send the order to the clerk of the transferee district court for fifteen days from the entry thereof." *Id.* If there is no opposition to the transfer in response to the conditional transfer order, the clerk of the JPML will transmit a final transfer order to the transferee court. *See* JPML Rule 7.4(d). "Conditional transfer orders do not become effective unless and until they are filed with the clerk of the transferee district court." JPML Rule 7.4(e). The pendency of a conditional transfer order "does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court." JPML Rule 1.5.

In this case, the district court remanded after the JPML issued a conditional transfer order but before transmittal of a final transfer order to the previously designated transferee, Judge Cote in the Southern District of New York. Therefore, the transfer had not become effective and the conditional order did not "in any way limit the pretrial jurisdiction" of the district court. JPML Rules 1.5, 7.4(e). Under the JPML rules of procedure, the district court did not exceed its authority in issuing the remand order. At oral argument, appellants acknowledged that they cannot prevail in this appeal without showing that JPML Rule 1.5 is invalid. They have attempted to do so by arguing that the rule conflicts with the text, structure, and purpose of § 1407.

Appellants' textual argument for invalidating Rule 1.5 is based on the language in the statute providing that "consolidated pretrial proceedings *shall* be conducted" by the transferee judge. 28 U.S.C. § 1407(b). Appellants contend that the word "shall" signals an obligation of the transferee court and deprives other courts of the authority to interfere with the transferee court's actions: "given the scope of the transferee court's authority over pretrial proceedings, it follows inevitably that once a transferee court has been designated, potential transferor courts—such as the district court below—do not enjoy the latitude to issue decisions contrary to the rulings of the transferee court." We disagree. Subsection (b) provides that the transferee judge shall conduct "consolidated pretrial proceedings," but subsection (a) states that actions must be "transferred," not merely designated, for "consolidated pretrial proceedings" to be conducted. Thus, though the statute identifies a duty of the transferee court *after* an action has been transferred, it does not suggest, even implicitly, that the authority of either court is affected *before* transfer by the mere designation of a transferee court. Consistent with this, Rule 1.5 states that the authority of the potential transferor court is not limited "in any way" prior to actual transfer. There is no textual conflict between § 1407 and Rule 1.5 that would support striking the latter or finding that the district court exceeded its authority in this case.

Appellants' structural argument for invalidating Rule 1.5 flows from their observation that § 1407, implicitly, and the rules, explicitly, contemplate tag-along actions that are brought to the JPML's attention for transfer after a multidistrict litigation has already been assigned to a transferee court. From this, appellants conclude that "the command that pretrial proceedings shall be before the designated transferee court affects not only cases transferred, but also those waiting to be transferred." Appellants contend that the "contrary interpretation leads to absurd results because it would allow

potential transferor courts to issue rulings discordant with those of the transferee court, which clearly undermines the stated purposes of the multidistrict litigation statute."

We find nothing absurd in district courts individually evaluating their own jurisdiction. Furthermore, Congress has indicated a preference for remands based on such individualized jurisdictional evaluations and a tolerance for inconsistency. As we have explained, 28 U.S.C. § 1447(d) bars appellate review of a remand order based on a district court's determination that it lacks subject matter jurisdiction. *See Baker v. Kingsley*, 387 F.3d 649, 653-54 (7th Cir. 2004). This creates a "one-bite-at-the-apple scheme," under which inconsistent jurisdictional decisions by district courts cannot be brought in line through the appellate process. *Adkins v. Ill. Cent. R.R. Co.*, 326 F.3d 828, 832 (7th Cir. 2003). Even clear errors in a district court's jurisdictional analysis may not be corrected by the courts of appeals if the district court *thought* that it lacked subject matter jurisdiction. *See Baker*, 387 F.3d at 655. Section 1447(d) makes clear that errors in favor of remand which yield inconsistent holdings on subject matter jurisdiction must be tolerated. *See id.* If the courts of appeals have no power to bring consistency to these remand orders, there is no reason why a sister district court, in a different circuit, should have this power. After a transfer takes place under § 1407, the transferee court has authority to issue consistent jurisdictional rulings in all of the transferred cases before it. Before the transfer is effective, however, the *potential* transferee court wields no such power over individual, unconsolidated cases.

Finally, appellants' statutory purpose argument for invalidating Rule 1.5 relies on § 1407's goal of centralizing civil litigation "involving one or more common questions of fact" that are "pending in different districts." 28 U.S.C. § 1407(a). The JPML is empowered to effectuate this goal by transferring pending actions upon determining that such transfers will

be to the "convenience of parties and witnesses and will promote the just and efficient conduct of such actions." *Id.* Appellants argue that the district court's order issued during the pendency of the transfer process undermines the purposes of the statute, namely, promotion of efficient litigation and avoidance of inconsistent contemporaneous rulings in like cases.

Undoubtably, efficiency and consistency are goals of § 1407. It does not follow from this premise, however, that any rule that limits efficiency or allows inconsistency conflicts with the statute and may not stand. As appellants acknowledge, among the statute's stated goals are the "convenience of parties and witnesses" and the "just . . . conduct of such actions." § 1407(a). To this end, the JPML rules provide for a conditional transfer period "in order to afford all parties the opportunity to oppose transfer." JPML Rule 7.4(a). Appellants do not, and cannot, suggest that the existence of this pre-transfer interim conflicts with the purposes of § 1407.

We need not decide if a district court ever exceeds its authority in acting during this period. We are satisfied, however, that it does not do so when it rules on its own jurisdiction. This, after all, is a fundamental obligation of all courts of limited jurisdiction. *See Hay v. Ind. State Bd. of Tax Comm'rs*, 312 F.3d 876, 878 (7th Cir. 2002). Though some district courts stay proceedings during the interim following a conditional transfer order, *see, e.g., Bd. of Trs. of the Teachers' Ret. Sys. of the State of Ill. v. WorldCom, Inc.*, 244 F. Supp. 2d 900 (N.D. Ill. 2002), this is not required where the court concludes that it lacks subject matter jurisdiction. We will not require a district court that believes that it lacks subject matter jurisdiction over a case to facilitate a transfer under § 1407, a statute that does not itself confer jurisdiction. Rule 1.5, as applied in this case, does not conflict with the text, structure, or purpose of § 1407, and the district court did not exceed its authority in issuing a remand order.

III. Conclusion

The order of the district court is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

REPLY APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed Nov. 4, 2003]

Nos. 03-5785/5786

TENNESSEE CONSOLIDATED RETIREMENT SYSTEM,
Plaintiff Appellee,

v.

CITIGROUP, INC.; CITIGROUP GLOBAL MARKETS, INC., formerly known as Salomon Smith Barney Inc.; J.P. MORGAN SECURITIES, INC.; J.P. MORGAN CHASE & CO.; BANK OF AMERICA CORP.; BANC OF AMERICA SECURITIES LLC; ABN AMRO INCORPORATED; DEUTSCHE BANK AG; DEUTSCHE BANC ALEX. BROWN, INC.; LEHMAN BROTHERS HOLDINGS, INC.; LEHMAN BROTHERS, INC.; CREDIT SUISSE FIRST BOSTON CORPORATION; GOLDMAN SACHS GROUP, INC.; GOLDMAN SACHS & CO.; UBS WARBURG LLC; NATIONSBANC MONTGOMERY SECURITIES LLC;
Defendants-Appellants (03-5785),

ARTHUR ANDERSON LLP;
Defendant-Appellant (03-5786)

ORDER

Before: RYAN, NORRIS, and ROGERS, *Circuit Judges*.

In 2001, the sole plaintiff in this action, the Tennessee Consolidated Retirement System ("TCRS"), purchased over $160 million in bonds issued by WorldCom, Inc. The following year, WorldCom announced that it had misstated its financial results in 2001. It entered bankruptcy proceedings in the Southern District of New York in July of

2002. TCRS initiated this action in Tennessee state court pursuant to § 22(a) of the Securities Act of 1933, 15 U.S.C. § 77v(a). It named as defendants various underwriters as well as WorldCom's accounting provider, Arthur Anderson.

Section 22(a) provides that a securities action brought in state court may not be removed to federal court. Nevertheless, the defendants removed the action to the Middle District of Tennessee pursuant to 28 U.S.C. § 1452(a) as a case in which federal subject-matter jurisdiction exists under 28 U.S.C. § 1334(b). Section 1334(b) grants federal jurisdiction over cases related to a pending bankruptcy action. Because they have contingent claims against WorldCom, the defendants assert this case is related to WorldCom's bankruptcy. TCRS promptly moved to remand the action to state court. The defendants, in the meantime, had sought a ruling by the Judicial Panel on Multidistrict Litigation ("MDL Panel") to transfer the case to the Southern District of New York for consolidation with other such cases. They moved the district court to stay its ruling pending a final decision by the MDL Panel. The district court, relying upon a suggestion of the MDL Panel that it was not divested of jurisdiction to do so, proceeded to the merits of the motion to remand.

After evaluating the statutes at issue, the court concluded that the § 22 prohibition against removal should prevail over the assertion of related-to jurisdiction and therefore granted the motion to remand. Alternatively, the district court suggested abstention under 28 U.S:C. § 1334(c)(l) was appropriate. However, the court stayed the remand of the case to permit the defendants an opportunity to appeal to this court. The district court suggested that this court might have appellate jurisdiction pursuant to the holding of *In re: Dow Corning Corp.*, 86 F.3d 482, 490 (6th Cir.1996).

The defendants appealed. TCRS now moves to dismiss both of these appeals on grounds that they seek review of an unreviewable order of remand. The defendants argue that they are actually seeking review of the district court's decision to deny a transfer of the case to the Southern District of New York. Alternatively, they seek review in mandamus. Additionally, the United States has intervened on grounds that the constitutionality of a statute is challenged and responds in support of the motion to dismiss.

The removal statute provides at 28 U.S.C. § 1447(d) that an "order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ." Likewise, an order remanding on equitable grounds a case that was removed from state court to federal court on an assertion of related-to jurisdiction is not reviewable by appeal or otherwise. 28 U.S.C. § 1452(b). Section 1447(d) bars the review of remand decisions that are "based on a timely raised defect in removal procedure or on a lack of subject-matter jurisdiction." *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-28 (1995). The prohibition on review likewise applies to orders of remand in cases removed under § 1452(b). *Things Remembered*, 516 U.S. at 128. And, § 1334(d) provides that a decision to abstain is not reviewable by appeal or otherwise.

The district court in the instant case concluded that § 22(a) precluded an assertion of related-to jurisdiction in this case. This defect was present at the time of removal, and as a result the district court held it could not exercise federal subject-matter jurisdiction. We conclude the district court's decision. is unreviewable under § 1447(d). *See Anusbigian v. Trugreen/Chemlawn, Inc.*, 72 F.3d 1253 (6th Cir. 1996) (decision on a non-jurisdictional issue that is necessarily related to the question of jurisdiction is not reviewable).

The defendants argue their appeal is from the denial of a request to transfer this case. They suggest that this court may

find appellate jurisdiction in the holding of *In re: Dow Corning Corp.*, 86 F.3d 482 (6th Cir. 1996). In that case, the defendants in product liability tort actions had contingent claims of contribution and indemnity against the Chapter 11 debtor, Dow Corning. They moved under 28 U.S.C. § 157(b)(5) to transfer all the tort actions to the district court where Dow's bankruptcy was being conducted. The district court, exercising its jurisdiction in bankruptcy, denied the motion. The nondebtor defendants appealed. This court held it had appellate jurisdiction to review that decision. First, the order was a final order in bankruptcy, where the concept of finality would be more flexibly applied. Secondly, the decision was appealable as a collateral order.

Dow Corning does not compel the exercise of appellate jurisdiction in the instant case. This case arises from the district court's exercise of its general jurisdiction, not its bankruptcy jurisdiction. Thus, there are no particular bankruptcy considerations or differing standards of finality that apply. Further, this case directly implicates the statutory bar on appellate review of 28 U.S.C. § 1447(d). *Dow Corning* did not involve the remand of a case to state court following a determination that the federal court lacked subject-matter jurisdiction.

The defendants alternatively ask that this court exercise its power of review in mandamus. One factor relevant to relief in mandamus is whether the petitioner for such relief has available a direct appeal. *In re Bendectin Products Liab. Litig.*, 749 F.2d 300, 304 (6th Cir. 1993). However, the authority exercised in mandamus cannot overcome the § 1447(d) bar on review of a remand order by "appeal or otherwise."

Therefore, the motion to dismiss these appeals hereby is GRANTED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

REPLY APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed JUN 18, 2003]

No. 02-15385
Non-Argument Calendar

D. C. Docket No. 02-00898-CV-A-N

THE RETIREMENT SYSTEMS OF ALABAMA, consisting of The Employees Retirement System of Alabama and The Teachers Retirement System of Alabama; The Public Education Employees' Health Insurance Fund; The Public Employees Individual Retirement Account Fund; The Clerks' and Registers' Supernumerary Fund; The Wildlife and Freshwater Fisheries Fund; The Alabama Cultural Resources Preservation Trust Fund; and the Alabama Trust Fund,

Plaintiff-Appellee,

versus

J.P. MORGAN CHASE & CO.,
J.P. MORGAN SECURITIES INC., *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Alabama

Before TJOFLAT, BIRCH, and COX, *Circuit Judges*.

PER CURIAM:

The Defendants[1] seek review of the district court's order remanding this action to state court pursuant to the court's discretionary abstention power under 28 U.S.C. § 1334(c)(1). The Retirement Systems of Alabama ("RSA") filed suit against the Defendants based on their alleged involvement in, or culpable knowledge of, the events and transactions that led to WorldCom Corporation's bankruptcy. Some of the Defendants filed a timely notice of removal to federal district court based on 28 U.S.C. § 1452(a), but the district court exercised its discretionary abstention power under §1334(c)(1) and granted RSA's Motion to Remand or to Abstain.

On appeal, RSA contends that this court lacks appellate jurisdiction to review the court's abstention decision based on the statutory bars to appellate review contained in 28 U.S.C. §§ 1334(d) and 1452(b). In response, the Defendants contend that the statutory bars in §§ 1334(d) and 1452(b) are unconstitutional and that this court has jurisdiction to evaluate the constitutionality of these statutes. Based on their argument that the statutory bars to appellate review are unconstitutional, the Defendants contend that this court has jurisdiction to review the district court's abstention order and they urge this court to hold that the district court's order constitutes an abuse of discretion. The United States has intervened to defend the constitutionality of §§ 1334(d) and 1452(b).

We have jurisdiction to evaluate the constitutionality of §§ 1334(d) and 1452(b). *See, e.g., Felker v. Turpin*, 518 U.S.

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[1] "The Defendants" refers collectively to J.P. Morgan Chase & Co,; J.P. Morgan Securities, Inc; Citigroup, Inc.; Salomon Smith Barney, Inc,; Arthur Andersen, LLP; Bank of America Corp.; Banc of America Securities LLC; Bernard J. Ebbers; Scott D. Sullivan; and Bear Stearns & Co., Inc.

651, 661, 665, 116 S.Ct. 2333, 2339, 2341 (1996) (dismissing for want of jurisdiction *after* rejecting a constitutional challenge brought on Article III, § 2, Exceptions Clause grounds); *see also United States v. Ruiz*, __ U.S.__, 122 S.Ct. 2450, 2454 (2002) (noting that a federal court always has jurisdiction to determine its own jurisdiction). Having carefully reviewed the briefs submitted by RSA, the Defendants, and the United States, we conclude that the statutory bars to appellate review contained in §§ 1334(d) and 1452(b) are constitutional. *Ex Parte McCardle*, 74 U.S. (7 Wall) 506, 513-14 (1869); *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 104 (1870). As a result, we lack jurisdiction to consider the Defendants' argument that the district court abused its discretion when it exercised its discretionary abstention power under § 1334(c)(1) and remanded the action to state court.[2]

DISMISSED FOR WANT OF JURISDICTION.

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[2] RSA's motion to dismiss, which was carried with the case, is DENIED AS MOOT in light of our conclusion in this opinion that we lack jurisdiction under §§ 1334(d) and 1452(b).

REPLY APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 3:03-0128
JUDGE HAYNES

TENNESSEE CONSOLIDATED RETIREMENT SYSTEM,
Plaintiff,

v.

CITIGROUP, INC., *et al.*,
Defendants.

ORDER

In accordance with the Memorandum filed herewith, the Defendants' motion for relief (Docket Entry No. 62) is GRANTED, but the Court affirms its earlier ruling. This action is REMANDED to the Chancery Court Davidson County, Tennessee.

It is so ORDERED.

ENTERED this the 8th day of October, 2004.

/s/ William J. Haynes, Jr.
WILLIAM J. HAYNES, JR.
United States District Judge

REPLY APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 3:03-0128
JUDGE HAYNES

TENNESSEE CONSOLIDATED RETIREMENT SYSTEM,
Plaintiff,

v.

CITIGROUP, INC., *et al.*,
Defendants.

MEMORANDUM

Plaintiff, Tennessee Consolidate Retirement System ("TCRS"), fled this action, originally in the Davidson County Chancery Court, against the Defendants: Citigroup, Inc.; Salomon Smith Barney, Inc.; J.P. Morgan Securities, Inc.; J.P. Morgan Chase & Co.; Bank of America Corporation; Banc of America Securities, LLC; ABN Amro Incorporated; Deutsche Bank AG; Deutsche Banc Alex. Brown, Inc.; Lehman Brothers Holdings, Inc.; Lehman Brothers, Inc.; Credit Suisse Group; Credit Suisse First Boston Corporation; Goldman Sachs Group, Inc.; Goldman Sach & Co.; UBS Warburg, LLC; Nationsbanc Montgomery Securities, LLC; and Arthur Andersen, LLP.

TCRS's action "is a securities suit involving WorldCom, Inc., naming as defendants WorldCom's investment bankers and its accountants for violations of the Securities Act of 1933 ('1933 Act") arising out of its purchases of WorldCom

debt securities (the "WorldComBond") sold to public investors in WorldCom's August 1998, May 2000 and May 2001 bond offerings (the "Offerings")." (Docket Entry No. 1, Attachment thereto, Exhibit A). TCRS's claims arise under Section 11 of the Securities Act of 1933 with jurisdiction under 22(a) of that Act, codified at 15 U.S.C. § 77v(a), as amended. TCRS alleges that misrepresentations were made in connection with bond purchases that TCRS made as investments for current and former Tennessee public employees. TCRS asserts only federal claims under Section 11 of the 1933 Act. Section 22(a) gives state courts concurrent jurisdiction with federal courts over Section 11 claims. 15 U.S.C. § 77v(a).

The Underwriter Defendants, with the exception of Arthur Andersen, LLP and Credit Suisse Group,[1] removed the action to this Court, asserting that TCRS's action is "related to" the bankruptcy of WorldCom, Inc. that is not a named defendant in this action. (Docket Entry No. 1, Notice of Removal). The Underwriter Defendants cited 28 U.S.C. § 1334(b), the federal bankruptcy jurisdictional statute, and 28 U.S.C. § 1452, the bankruptcy removal statute, as the legal bases for their removal and this Court's jurisdiction. In earlier proceedings, the Court granted the Plaintiff's motion to remand concluding that the express provisions of Section 22(a) of the Securities Act of 1933, as amended in 1998, barred the removal of this action from the Court. In light of a possible appeal, under the Sixth Circuit precedent, the Court

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[1] Arthur Andersen joined the other Defendant' opposition to TCRS's motion to remand. *See* Docket Entry No. 27. Under 28 U.S.C. § 1452(a), a single party can remove an action. 16 James W. Moore, et al., *Moore's Federal Practice*, at 107.15[8][b]. Credit Suisse Group was apparently inadvertently omitted from the list of Underwriter Defendants in the Notice of Removal.

stayed its Order of removal so as to not to prejudice the Defendants' appeal rights.[2]

Before the Court is the Defendants' motion for relief under Fed. R. Civ. P. Rule 60(b) (Docket Entry No. 62), contending that since the Court's decision, a copy of which is attached hereto, the Second Circuit in *California Public Employees Retirement System v. WorldCom, Inc.*, 368 F.3d 86 (2d Cir. 2004), has held that Section 22(a) does not preclude the exercise of federal bankruptcy jurisdiction. Plaintiff responds that Second Circuit opinion does not present any new legal arguments to justify relief under Rule 60(b).

The Court applies the law of the case doctrine and will not set aside its earlier Order of remand absent a showing of manifest error or injustice. *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994).

The Court holds the Second Circuit and the Honorable Jose A. Cabranes, the author of the *WorldCom* opinion in the highest regard. Yet, after review of the Second Circuit's decision, the Court reaffirms its earlier conclusion that Section 22(a) precludes the removal of Plaintiff's action to this Court. In the Court's view, the Second Circuit decision misapplies Supreme Court precedent; erroneously utilizes a rule of statutory construction to set aside a clear statutory mandate and misconstrues this Court's earlier opinion.

In its analysis of the issue of statutory construction, the Second Circuit relied principally on *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). After its review of the circumstances in *Radzanower*, involving different venue

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[2] Contrary to the suggestion of the District Court in *WorldCom, Inc. Securities Litigation*, 2003 WL 22953644, * 6 (S.D.N.Y. 2003), the Court was not "[e]xpressing uncertainty about its analysis [in] stay[ing] its ruling pending appeal." The Court stayed its Order to avoid the Defendants losing any appeal of that Order of remand.

statutes for claims against a national bank, the Second Circuit concluded:

> Based on the principles of statutory interpretation articulated in *Radzanower*, we cannot conclude that Section 22(a) is more "specific" than Section 1452(a). First, unlike the National Bank Act's venue provision, which applies to a defined group of litigants, Section 22(a), like both Section 1452(a) and the 1934 Act's venue provision, applies to a defined class of claims. Thus, the Supreme Court's distinction between a statute applicable to a "broad" universe of potential defendants" and a statute that protects a "particularized" group of defendants, *id.* at 153-54, 96 S.Ct.1989, carries not weight here.
>
> Additionally, the class of claims covered by Section 22(a) is no more specific than the class of claims covered by Section 1452(a). Section 22(a) does not cover only a subset of the claims covered by Section 1452(a). By the same token, Section 1452(a) does not cover only a subset of the claims covered by Section 22(a). Rather, just as Section 1452(a) applies to many claims that are not brought under the 1933 Act, Section 22(a) applies to many claims that are not "related to" a bankruptcy.
>
> In that respect, it is instructive to compare Section 1452(a) to the general removal statute, which, "except as otherwise expressly provided by Act of Congress," permits removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction . . . " 28 U.S.C. §1441(a), Even without the introductory clause in Section 1441(a), Section 22(a) would arguably trump that provision on the ground that Section 22(a) is more specific than Section 1441(a); that is Section 22(a) applies to only one. . .

Finally, even if we were to conclude that Section 22(a) covers a more "specific" group of claims than Section 1452(a), Section 22(a) would not necessarily control. The Supreme Court in *Radzanower* indicated that where the application of a specific statute would "unduly interfere" with the operation of a general statute that was enacted subsequent to the specific statute, the more general statute controls. *See Radzanower*, 426 U.S. at 156, 96 S.Ct. 1989. In *Radzanower*, however, the Court determined that the National Bank Act's venue provision would not "unduly interfere" with the operation of the 1934 Act, because (1) the provision "will have not impact whatever upon the vast majority of lawsuits brought under that Act" and (2) "[i]n the tiny fraction of litigation where its effect will be felt, it will foreclose nobody from invoking the Act's provisions." *Id.*

We are not so sanguine about Section 22(a)'s effect on the system created by the Bankruptcy Code. When Congress enacted Section 1452(a) in 1984, fifty years after it first enacted Section 22(a), "Congress intended to grant comprehensive jurisdiction to bankruptcy courts so that they might deal efficiently and expeditiously with *all* matters connected with the bankruptcy estate," *Celotex Corp. v. Edwards*, 514 U.S. 300, 308, 115 S. Ct. 1493, 131 L. Ed. 2d 403 (1995) emphasis added and internal quotation marks omitted). Therefore, Congress crafted Section 1452(a) to allow removal in a broad array of situations. First, unlike Section 1441(a), which authorizes *defendants* to remove, the bankruptcy removal statute authorizes *any* "party," including plaintiffs, to remove. *See* 28 U.S.C. § 1452(a). Second, because any *one* "party" can remove under Section 1452(a), removal that provision, unlike removal under Section 1441(a), does not require the unanimous consent

> of the defendants. *See Creasy v. Coleman Furniture Corp*, 763 F.3d 656, 660 (4th Cir. 1985).
>
> * * * *
>
> Because, in any given case, the full amount of damages sought under the 1933 Act can be the basis for a claim against the estate, the policy underlying Section 1452(a) applies with full force to claims under the Act. Section 1452(a) dictates that these claims, when they are brought against defendants with contribution rights, should not be subject to conflicting outcomes along with repetitive and time-consuming discovery proceedings in multiple state courts.
>
> In sum, because Section 22(a) does not cover a narrower class of claims than Section 1452(a), it cannot be considered more "specific" than Section 1452(a). Moreover, even if Section 22(a) were more specific than Section 1452(a), *Radzanower* counsels that, because Section 22(a) could interfere with the operation of the Bankruptcy Code, it would not necessarily control.

368 F.3d at 102-04.

The Second Circuit also noted that "SLUSA . . . merely expanded federal jurisdiction over class actions," and that "'nothing in the text or legislative history of SLUSA indicates that Congress intended to alter the jurisdictional scheme applicable to *individual* actions under the 1933 Act.'" *Id.* at 104-05 (quoting *In Re Global Crossing, Ltd. Sec. Litig.*, 2003 WL 21659360, at *3 (S.D.N.Y. July 15, 2003)) (emphasis in the original). "Because Congress did not manifest an intent to alter the preexisting law when it amended the 1993 Act in 1988, we cannot resolve the statutory conflict by focusing on SLUSA." *Id.* at 105. Thus, the Second Circuit deferred to § 1452(a) and concluded that "Congress did not intend for Section 22(a) and its analogues to bar removal of 'related to' claims." *Id.* at 106.

The Second Circuit reasoned that unlike § 1441(a), § 1452(a) does not contain a clause excepting claims arising under an Act of Congress that otherwise prohibits removal and a literal reading of Section 22(a) would render the exception clause under § 1441(a) mere surplusage. *Id.* at 106. "In other words, if we concluded that a nonremoval provision such as Section 22(a) prevents removal under *both* Section 1441(a) and Section 1452(a), notwithstanding the phrase '[e]xcept as otherwise expressly provided by Act of Congress' in Section 1441(a), that phrase in the general removal statute would serve no apparent purpose." *Id.* Second Circuit thus concluded that Section 1452(a) "grant[ed] *additional* removal jurisdiction in a class of cases which would not otherwise be removable under the prior grant of authority. . . . [Therefore,] generally nonremovable claims brought under the Securities Act of 1933 may be removed to federal court if they come within the purview of 28 U.S.C. § 1452(a), which confers federal jurisdiction over claims that are related to a bankruptcy case." *Id.* at 107-08 (internal quotation omitted).

The Court respectfully disagrees with the Second Circuit for several reasons. First, *Radzanover* articulates the principle that the specific statute governs the more general statute.

> It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. *"Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."* *Morton v. Mancari*, 417 U.S. 535, 550-551. "The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contra-

> dicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all."

426 U.S. at 153 (emphasis added and citations omitted) (quoting T. Sedgwick, The Interpretation and Construction of Statutory and Constitutional Law 98 (2d ed. 1874)).

Another Sedgwick rule of statutory construction supports this Court earlier conclusion:

> "*Leges posteriores, priores contrarias abrogant.* 'If *two inconsistent acts be passed at different times, the last,' said the Mater of the Rolls, 'is to be obeyed; and if obedience cannot be observed without derogating from the first, it is the first which must give way.* Every act of Parliament must be considered with reference to the state of the law subsisting when it came into operation, and when it is to be applied; it cannot otherwise be rationally construed. Every act is made, either for the purpose of making a change in the law, or for the purpose of better declaring the law; and its operation is not to be impeded by the mere fact that it si inconsistent with some previous enactment."

Sedgwick, supra, at 104.

The Court remains of the view that *Radzanower* counsels the enforcement of more specific statute, to Section 22(a) that applies a particular and well defined group of Plaintiffs that Congress consciously selected after a study of state and federal securities class actions.

Second, the Second Circuit's analysis lies principally in its characterization of SLUSA as a "mere[] expan[sion]" of federal jurisdiction over class actions and its subsequent analysis of 28 U.S.C. § 1452(a) as the later-enacted modifier

of Section 22(a). *Id.* at 105-08. The relevant Section 22(a) provisions, as amended by SLUSA in 1998 provide:

> *Notwithstanding any other provision of this section, nothing in this section may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised soley of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.*
>
> * * *
>
> *Except as provided in section 77p(c) of this title* [dealing with class actions], no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

15 U.S.C. §§ 77p(d)(2)(A), 77v(a) (emphasis added).

Under the SLUSA amendments, Section 77p(d)(2)(A) as part of a statutory overhaul added section covering "Protected Actions", and Section 77v(a) was amended to include its current first clause. The Second Circuit based its analysis on the fact that exception to removal under Section 77v(a) predated Section 1452(a), and concluded that the latter created an exception to the former. This Court disagrees with this conclusion. Congress' 1998 amendments to the Securities Act of 1933 added several provisions allowing for the removability of class actions, and also featured provisions, such as Section 77p(d)(2)(A) above, which "protected" state actions such as those dealing with state pension.

> The legislation provides for certain exceptions for specific types of actions. The legislation preserves State jurisdiction over: (1) certain actions that are based upon the law of the State in which the issuer of the security in question is incorporated; (2) actions brought by States

> and political subdivisions, and State pension plains, so long as the plaintiffs are named and have authorized participation in the action; and (3) actions by a party to a contractual agreement (such as an indenture trustee) seeking to enforce provisions of the indenture.

H.R. Conf. Rep. 105-803, ** 13, 14.

Congress clearly modified Section 77v(a) by excepting from the removal exception only the state class actions described in Section 77p(c): "Except as provided in section 77p(c) of this title . . . . " Congress did this in 1998 with full knowledge of the Bankruptcy removal statute, yet did nothing to textually provide for the removability of cases under 77p (except those under subsection (c)) "related to" bankruptcy claims.

Thus, SLUSA does more than "merely expand" federal jurisdiction over class actions, SLUSA specifically "disallows the removal of actions under the Securities Act of 1933 from any state court from competent jurisdiction," and it "expressly recognizes the 'special interests of states in the context of securities litigation . . . evinc[ing] a policy of special respect for the forum choices of state pension plans with regard to securities claims and for state courts whose jurisdiction is invoked to hear them, and adds a strong reason for abstention . . . . '" *Tenn Consol. Ret. Sys. v. Citigroup, Inc.*, 2003 WL 22190841, at *3 (M.D. Tenn. May 9, 2003) (quoting *Ret. Sys. of Ala. v. Merrill Lynch & Co.*, 209 F. Supp. 2d 1257, 1269 (M.D. Ala. 2002)).

Because SLUSA enumerated many classes of state-initiated securities cases, yet granted state court jurisdiction to only one specific class of cases, and amended the removal exception statute without reflecting Section 1452(a), this Court concludes that Section 22(a)'s removal exception, read in light of SLUSA, trumps Section 1452(a) as it applies to this action.

Accordingly, the Court considers the 1998 SLUSA amendments to Section 22(a) as the later-enacted modifier of Section 1452. The SLUSA amendments were enacted after Section 1452(a); is more specifically worded; and expressly removes from federal jurisdiction a narrow class of cases, including claims related to state pension plans. Congress enacted SLUSA with full cognizance of the existence and breadth of Section 1452(a). The Court concludes that as the later-enacted, specifically-worded statute, SLUSA's exception to federal jurisdiction control over the general grant of federal jurisdiction to "any claim 'related to'" bankruptcy cases in Section 1452(a).

To the extent a conflict between Section 22(a) and the bankruptcy statute exists, the Court's conclusion in this case is consistent with the Supreme Court's holding in *Radzanower* that a specific statute governs a previously-enacted generally-worded one. *Radzanower*, 426 U.S. at 154 ("[W]here provisions in . . . two acts are in irreconcilable conflict, *the later act to the extent of the conflict* constitutes an implied repeal of the earlier one") (emphasis added). The remedy for this conflict rests with Congress.

Third, the Second Circuit's reading of SLUSA and Section 1452(a) nullifies and eviscerates the clearly articulated intent of Congress to preserve to the state court's jurisdiction over certain securities actions concerning state pension funds. Even if Section 22(a) were read as predating Section 1452, the former, more specific statute would be nullified. As the Court noted previously in this action, "'[t]he primary rule of statutory construction is to ascertain and give effect to the legislative intent.'" *Tenn. Consol Ret. Sys.*, 2003 WL 22190841, at *3. Indeed, Congress recognized explicitly the distinction between securities claims involving public employee pension funds and espoused the policy of fiscal integrity so as to allow them to pursue claims against a named

defendant, and not against the debtor. The exemption of state pension plans from SLUSA's preemption provisions:

> "embodies a Congressional recognition of the special needs of state governments and pension plans to be able to pursue state law remedies in state courts in order to protect their pensioners and taxpayers from securities fraud. . . . [T]hese provisions clearly evince a policy of special respect for forum choices of state pension plans with regard to securities claims and for state courts whose jurisdiction is invoked to hear them. . . ."

Id. at *3 (quoting *Ret. Sys. of Ala.*, 209 F. Supp. 2d at 1269).

Thus, the Court reaffirms its conclusion that "Section 22(a) is a clear statutory prohibition" to removal *Tenn. Consol Ret. Sys.*, 2003 WL 22190841, at *3, that evinces a clear legislative intent to reserve to the state pension funds the right to litigate securities action in state courts. This statutory command should be honored.

For these reasons, the Defendants' motion to reconsideration is granted, but the Court affirms its earlier ruling.

An appropriate Order is filed herewith.

ENTERED this the 8th day of October, 2004.

/s/ William J. Haynes, Jr.
WILLIAM J. HAYNES, JR.
United States District Judge